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No.———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERADA HESS CORPORATION *et al.*,
Appellants,

v.

DIRECTOR, DIVISION OF TAXATION,
Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Due Process, Commerce, and Equal Protection Clauses of the United States Constitution permit a state, in defining the taxable net income of a multistate corporation, to include income contributed by an exclusively out-of-state business activity but to exclude associated costs incurred solely on account of that activity.

LIST OF PARTIES AND RULE 28.1 STATEMENT

This Jurisdictional Statement is filed on behalf of the following appellants, each of whom was a party in the Supreme Court of New Jersey:

Amerada Hess Corporation
Atlantic Richfield Company
Chevron U.S.A. Inc.
Cities Service Company
Conoco Inc.
Exxon Corporation
Gulf Oil Corporation
Mobil Oil Corporation
Phillips Petroleum Company
Shell Oil Company
Union Oil Company of California

The remaining parties in the Supreme Court of New Jersey were:

Diamond Shamrock Corporation
Tenneco Oil Company
Texaco Inc.
Director, Division of Taxation, New Jersey Department of the Treasury

Because of their length, the lists of appellants' affiliates required by Rule 28.1 are set forth in Appendix I to this Jurisdictional Statement, pp. 105a-155a.

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On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Amerada Hess Corporation *et al.* appeal from the judgment of the Supreme Court of New Jersey, dated June 22, 1987, upholding the New Jersey Corporation Business Tax Act against appellants' claims that, as construed and applied, the statute is repugnant to the Due Process, Commerce, and Equal Protection Clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App. 1a-35a)[1] is reported at 107 N.J. 307, 526 A.2d 1029. The opinion of the Appellate Division of the Superior Court of New Jersey (App. 36a-42a) is reported at 208 N.J. Super. 201, 505 A.2d 186. The opinion of the Tax Court of New Jersey (App. 43a-49a) is reported at 7 N.J. Tax 51, and its opinion denying reconsideration (App. 50a-61a) is reported at 7 N.J. Tax 275.

[1] "App." refers to the Appendix to this Jurisdictional Statement.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on June 22, 1987. App. 1a. Notices of appeal to this Court were timely filed in the Supreme Court of New Jersey on August 20, 1987. App. 62a-83a. This appeal was docketed within 90 days from the entry of judgment below.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(2). That section authorizes an appeal to this Court when the highest court of a state upholds a state statute against a claim that the statute, as construed and applied, is invalid under the United States Constitution. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the United States Constitution, the New Jersey Corporation Business Tax Act, and the Crude Oil Windfall Profit Tax Act of 1980 are set forth at App. 92a-104a.

HOW THE FEDERAL QUESTION WAS RAISED

Appellants raised the federal constitutional question in their amended complaints in the New Jersey Tax Court,[2] in their briefs in support of summary judgment before the Tax Court,[3] and in their briefs on appeal before the Appellate Division of the Superior Court and

[2] Appellate Division Joint Appendix for Plaintiffs-Appellants 518a-525a, 526a, 556a-562a, 563a-564a, 569a, 633a-638a, 640a, 646a, 708a-716a, 749a-755a, 760a-761a, 815a-821a, 822a, 859a-865a, 866a, 900a-906a, 907a, 936a-942a, 943a-944a, 949a, 994a-1000a, 1002a, 1031a-1037a, 1038a; Appellate Division Appendix for Amerada Hess 17a-22a, 26a-27a. Copies of the Joint Appendix (hereinafter "Pl. Jt. App.") and the Amerada Hess Appendix (hereinafter "Hess App.") have been lodged with the Clerk of this Court.

[3] Brief for Plaintiffs 70-87; Memorandum for Amerada Hess 44.

the Supreme Court of New Jersey.[4] The New Jersey Supreme Court considered and expressly rejected appellants' constitutional claims. App. 33a-35a.

STATEMENT

Appellants are 11 vertically integrated oil and gas companies. They engage in all aspects of the oil business, including exploration, production, refining, transportation, distribution, and marketing. App. 2a. Collectively, they do business and own property in nearly all 50 states and the District of Columbia. Pl. Jt. App. 1132a; Hess App. 2a.

Since no oil is produced in New Jersey, appellants do not engage in that aspect of the oil business there. App. 2a. Several of them, however, conduct refining operations in New Jersey, and all of them market petroleum products in that state. App. 2a; Pl. Jt. App. 1132a-1137a; Hess App. 2a. They compete at both the wholesale and retail levels not only with each other but also with non-producer independent refiners and marketers.

All of the appellants are subject to the federal Windfall Profit Tax ("WPT"), imposed on the "removal" of crude oil from the producing premises, and the New Jersey Corporation Business Tax ("CBT"), a franchise tax measured by a corporation's "entire net income." The interaction of those two tax schemes, each of which is summarized below, gives rise to the present controversy.

As construed by the Supreme Court of New Jersey, the CBT precludes a deduction for the billions of dollars in WPT payments that appellants and others have made to the federal government since 1980. Because the WPT

[4] Joint Brief for Plaintiffs-Appellants 62-76; Brief for Amerada Hess 37 n.28. Under New Jersey appellate practice, when the Supreme Court grants certification to review a final judgment of the Appellate Division, "the appeal shall be submitted [to the Supreme Court] on the briefs, appendices and transcripts filed with the Appellate Division." N.J. Rule 2:12-11.

operates as a cost of producing crude oil, and because no crude oil is produced in New Jersey, the effect is to increase the New Jersey tax base, and consequently the New Jersey tax liability, of crude oil producers solely because of and in rough proportion to their exclusively out-of-state production activities. The question under this Court's decisions is whether the CBT, as interpreted, taxes a greater portion of multistate income than is fairly attributable to the business done in New Jersey and whether it imposes a discriminatory tax burden on out-of-state business.

A. The Windfall Profit Tax

During the 1970s, the domestic oil industry was subject to an elaborate system of price and allocation controls. The system was gradually dismantled between 1975 and 1981, when all regulatory authority was terminated. In late 1979 and 1980, shortly after the President began phasing out crude oil price controls, the world market price for crude oil soared, and Congress became acutely sensitive to the political implications of allowing domestic producers to sell at the substantially higher uncontrolled prices. In the Crude Oil Windfall Profit Tax Act of 1980, I.R.C. §§ 4986 *et seq.*, Congress addressed that concern by imposing "an excise tax on the additional revenue resulting from decontrol." *United States v. Ptasynski*, 462 U.S. 74, 76 (1983). "Without such a tax, decontrol probably could not [have gone] forward." Staff of Jt. Comm. on Taxation, *General Explanation of the Crude Oil Windfall Profit Tax Act of 1980*, at 26 (Jt. Comm. Print 1981) [hereinafter *General Explanation*].

The tax was intended to reserve for the federal treasury a "fair share" of the economic benefits of deregulation, thereby achieving "greater equity in the distribution of the gains from higher oil prices." S. Rep. No. 394, 96th Cong., 1st Sess. 6 (1979). Congress sought to "strike the appropriate balance between tax receipts that

could be used for public investment or redistribution and industry incentives to increase domestic oil production." Cong. Budget Office, *The Windfall Profits Tax: A Comparative Analysis of Two Bills* xv (Nov. 1979); *see* S. Rep. No. 394, *supra*, at 6-7; *General Explanation* 6, 26.

By its terms, the WPT is "[a]n excise tax . . . on the windfall profit from taxable crude oil removed from the premises during each taxable period." I.R.C. § 4986(a). The transaction that triggers the tax is the removal of a barrel of crude oil from the producing premises. A barrel is "removed" when it is brought to the surface and "physically transported" away from the "immediate vicinity of the well." Treas. Reg. § 51.4996-1(d)(1). The producer must pay the tax regardless of whether it sells or otherwise disposes of the barrel of crude oil.

The measure of the tax—"windfall profit"—is the increase in the value of each barrel of crude oil at the wellhead attributable to federal price decontrol. The incremental value is a function of (1) the "removal price" less (2) the sum of the "adjusted base price" plus "the amount of the severance tax adjustment." § 4988(a).[5]

Congress included a "net income limitation" ("NIL") designed, as the New Jersey Supreme Court noted, "to

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[5] The "removal price" is for most purposes the uncontrolled or world market price for crude oil. If a barrel is sold and then removed from the premises, the removal price is the "amount for which the barrel is sold." § 4988(c)(1). If a barrel is removed before sale (or is sold to a related person), the removal price is the "constructive sales price"—generally "the representative market or field price of the oil." § 4988(c)(3); Treas. Reg. § 1.613-3(a). The "adjusted base price" is the approximate price, adjusted for inflation, at which the barrel would have been sold in 1979 (before price decontrol). § 4989(a). The "severance tax adjustment" is the amount by which any state severance tax imposed on a barrel exceeds the severance tax that would have been imposed if the barrel had been valued at its adjusted base price. § 4996(c).

insure that the W.P.T. would not be imposed on a company when the costs of production exceeded the income from a particular property." App. 6a. Under the NIL, the "windfall profit" on a barrel may not exceed "90 percent of the net income attributable to such barrel." § 4988(b)(1). The net income attributable to a barrel refers, not to the producer's overall net income from operations, but rather to its per barrel "taxable income from the property." § 4988(b)(2). A producer may have many properties, some profitable and others unprofitable, depending on the acquisition, development, and operating costs of each. Because "taxable income from the property," and therefore the NIL for each barrel, must be computed separately for each property, Treas. Reg. § 51.4988-2(b)(1)(i), a producer may have, in the same tax year, substantial WPT liability despite having no taxable income for federal income tax purposes.[6]

The Act divides domestic crude oil into three tiers and assigns to each an adjusted base price and a tax rate ranging from 30 to 70 percent. I.R.C. §§ 4987(b), 4989, 4991. The amount of tax with respect to each barrel of crude oil is computed by multiplying the "windfall profit on such barrel" by the applicable tax rate. § 4987(a).

For federal income tax purposes, WPT payments are treated as inventoriable production costs under I.R.C. § 471, and are therefore subtracted from gross receipts in determining a corporation's gross income. Alternatively, WPT payments in some circumstances may be

[6] "Even if one oil property is producing oil at a profit substantial losses from other property may actually put the producer in a net loss position. The windfall profits tax will still have to be paid, however, on the oil produced from the 'profitable' property." Robison, *The Misnamed Tax: The Crude Oil Windfall Profit Tax of 1980*, 84 Dick. L. Rev. 589, 601 n.89 (1980).

reclassified and deducted from gross income as "ordinary and necessary" business expenses under I.R.C. § 162 or as taxes under I.R.C. § 164.[7] In assessing the federal tax impact of the WPT, Congress assumed that WPT payments also "generally would be deductible under State income taxes." H.R. Rep. No. 304, 96th Cong., 1st Sess. 9 (1979); *see* H.R. Conf. Rep. No. 817, 96th Cong., 2d Sess. 163 (1980); S. Rep. No. 394, *supra*, at 9; *General Explanation* at 9.

B. The New Jersey Corporation Business Tax

New Jersey imposes an annual tax (the CBT) on the "entire net income" of each corporation that does business in the state. N.J. Rev. Stat. § 54:10A-5(c). If a corporation does business both within and without the state, the CBT is imposed on the portion of the corporation's "entire net income" that is attributable to New Jersey under a three-factor apportionment formula representing New Jersey's share of the corporation's total receipts, payroll, and property. N.J. Rev. Stat. § 54:10A-6.

Federal taxable income is the starting point for determining "entire net income" under the CBT. The New Jersey statute provides that a taxpayer's entire net income is "deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its federal income tax." N.J. Rev. Stat. § 54:10A-4(k).

The statute provides that certain federal deductions must be added back to federal taxable income for purposes of the CBT. Under the "add-back" provision (App.

[7] Although inventoriable costs are subtracted from gross receipts in computing gross income, rather than deducted from gross income in computing taxable income, the ultimate effect on taxable income is the same. We occasionally use "deduction" in this Jurisdictional Statement in the broadest sense to embrace any cost subtractable either from gross receipts or gross income.

2a), "[e]ntire net income shall be determined without the exclusion, deduction or credit of: . . . [t]axes paid or accrued to the United States on or measured by profits or income." N.J. Rev. Stat. § 54:10A-4(k)(2)(C). Many state tax schemes employ comparable add-back provisions. They are intended to prevent erosion of a state's net income tax base through the deduction of similar taxes levied by other jurisdictions on the same base.

C. The Proceedings Below

1. *The Assessments*

At issue in this litigation are the 1980 CBT returns filed by all of the appellants and the 1981 CBT returns filed by five of the appellants.[8] Each appellant, in computing its New Jersey "entire net income," adjusted its federal taxable income in accordance with the requirements of N.J. Rev. Stat. § 54:10A-4(k). No appellant added back WPT costs to federal taxable income. All considered the WPT to be a federal excise tax imposed on the production of crude oil and measured by the value of the crude oil at the wellhead, not a tax on or measured by corporate income or profit within the scope of the New Jersey add-back provision.

The Director of the Division of Taxation, New Jersey Department of the Treasury, issued CBT deficiency assessments to appellants (resulting in certain cases in the reduction or disallowance of refund claims). The Director expressly based the assessments and refund denials on the failure of appellants to add back their WPT payments in computing "entire net income." Each appellant filed a protest. After conferences with the appellants, the Director issued final determination letters denying the protests. Pl. Jt. App. 1139a; Hess App. 28a-31a.

The add-back of WPT payments made a "substantial difference" in the tax liability of each of the appellants.

[8] The state has deferred final action, pending the outcome of this litigation, on the 1981 returns filed by the other six appellants and on the subsequent years' returns filed by all the appellants.

App. 44a. The amount and the percentage of each appellant's increased tax liability resulting from the add-back of WPT are set forth at App. 84a.

2. *The Litigation*

a. Each appellant filed a complaint in the Tax Court of New Jersey challenging the deficiency assessment or refund denial. The litigation raised essentially two issues: (1) whether the WPT falls outside the scope of the New Jersey add-back provision because it is not a tax "on or measured by profits or income," and (2) if the WPT is nonetheless within the scope of the add-back provision as construed, whether the statute, by disallowing a deduction for costs incurred solely on account of activities conducted exclusively outside New Jersey, conflicts with the United States Constitution. The Tax Court rejected appellants' claims on both issues. App. 43a-49a. It emphasized, in denying reconsideration, that its construction of the add-back provision turned, not on "whether the WPT *was in fact* a tax on or measured by profits or income," but rather on "what the [state] Legislature perceived it to be." App. 57a (emphasis in original).

b. On appeal, the Appellate Division of the Superior Court reversed. It determined that, "[b]ecause the WPT is payable without regard to the profitability of the oil producers' overall business activities," it "is not a tax on or measured by profits or income" and thus does not fall within the add-back provision. App. 39a, 42a. That provision's "purpose," the Appellate Division noted, is "to preserve undiluted for state taxation the same tax base upon which federal income taxes were computed." App. 41a. The provision "should not be read to include legitimate business expenses," such as WPT costs, because adding such expenses back to the tax base could "create tax liabilities in spite of overall losses," contrary to the fundamental design of the CBT. App. 41a. In light of its construction of the statute, the Appellate Division had no need to address the constitutional issue.

c. The New Jersey Supreme Court reversed the judgment of the Appellate Division and reinstated the judgment of the Tax Court. The Supreme Court acknowledged that, unlike the C[illegible] WPT is "imposed on production at the wellhead" and that its measure is not a company's "overall net profits or income" but rather the incremental value of a barrel of crude oil at the wellhead resulting from decontrol. App. 5a-6a. It accordingly recognized that the WPT is not "directed at the same income base as the C.B.T." App. 33a. Nevertheless, based on "the principle of probable legislative intent" (App. 10a), it concluded that the WPT fell within the add-back provision.

Even without adding back the WPT deduction, New Jersey would enjoy a significantly expanded tax base, and materially higher tax revenues, because of the impact of price decontrol on the net income of crude oil producers. The New Jersey Supreme Court nonetheless theorized that, "if the Legislature had anticipated the enactment of the W.P.T., it would have been concerned," that the "deductibility of the W.P.T. would shrink the State's tax base." App. 11a. For that reason, according to the Court, "the Legislature probably would have viewed the W.P.T. as a tax on the 'profits' and 'income' of oil companies, thereby avoiding a revenue loss." App. 11a.

The Court next considered the constitutionality of the statute as interpreted. First, it held that disallowing a deduction, even for costs incurred solely on account of out-of-state activities, does not implicate the territorial limitations on state taxing power imposed by the Due Process Clause. So long as the state employs a constitutionally permissible "three-factor apportionment formula," it is "entitled to include" in the tax base of a unitary business "100% of [its] entire net income." App. 33a. Implicit in the Court's holding is the view that nothing in the constitution limits the manner in which the state defines "entire net income"—that it may

require add-backs, or disallow deductions, without regard to any resulting geographical distortions in the tax base.

Second, the Court held that "[d]enial of the W.P.T. deduction does not violate the commerce clause because it does not favor in-state over out-of-state economic activity." App. 34a. The Court did not address appellants' contention that, under the Court's construction of the CBT, taxpayers that engage in the exclusively out-of-state activity of oil production are subjected to a discriminatorily higher effective tax burden than are all other taxpayers, including independent marketers with whom the integrated companies directly compete in the New Jersey market.

Finally, the Court concluded that the disparate treatment of integrated companies and independent marketers does not violate the Equal Protection Clause. Integrated companies, the Court stated, "are denied a deduction because they produce crude oil and pay the W.P.T.," "while non-oil-producing petroleum marketers are not affected" because they "do not pay the W.P.T." App. 34a. It apparently made no difference that only those companies engaged in an exclusively out-of-state activity are denied a deduction for a substantial cost of producing or acquiring their goods. The Court further stated that producers, unlike independent marketers, had benefited "from the decontrol of crude oil prices." App. 34a. It did not explain why the measure of the producer's benefit may properly include not only the producer's but also the federal treasury's share of those higher prices.

THE QUESTION IS SUBSTANTIAL

I. THE CASE WARRANTS PLENARY REVIEW

This appeal squarely presents a fundamental question of state taxing power that this Court has not yet directly addressed: may a state, in taxing a multistate enterprise under the unitary business/formula appor-

tionment method, define "income" on a geographically tailored basis?

Under this Court's Due Process and Commerce Clause decisions, a state may tax only that portion of an interstate company's net income that is " 'reasonably attributable' to the business done there." *Butler Bros. v. McColgan*, 315 U.S. 501, 506 (1942). The Court has been called upon frequently to measure against that standard two of the three key elements of state apportionment schemes—the fairness of the apportionment formula and the proper confines of the unitary business concept. *See Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 165-71 (1983). The question here is whether the third element—the definition of the taxable income of a unitary business—must, like the other two, be geographically neutral. This is the first case to reach this Court in which a state, while applying a standard three-factor apportionment formula, has introduced a material geographic bias into its determination of net income subject to apportionment.

New Jersey has achieved that result by denying a deduction for federal WPT payments—a cost borne only by producers of crude oil and measured by the incremental value at the wellhead of the oil they produce. No crude oil is produced in New Jersey. WPT liability is incurred only on account of business activities conducted entirely outside the state. When a state with no oil production taxes oil producers under a unitary business/formula apportionment method but denies a deduction for a substantial production cost, the effect is to gerrymander the preapportiomnent tax base, incorporating the out-of-state income while excluding the out-of-state costs incurred in generating that income.

The reach of state power to define the taxable income of a unitary business warrants this Court's plenary review. The New Jersey Supreme Court wrongly assumed that the federal constitution imposes no constraints at all on the exercise of that power. Under its theory, if a

state correctly determines the scope of a unitary business and applies an acceptable three-factor apportionment formula, nothing in the constitution prevents it from defining taxable income in any way it sees fit, even if the definition necessarily produces gross geographic distortions. That view eviscerates the fair apportionment requirement. It would be pointless to insist on a geographically neutral apportionment formula if the state were free to apply it to a geographically distorted income base.

In striking down New York's geographically discriminatory tax credit in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), this Court held that "[n]othing about the apportionment process releases the State from the constitutional restraints that limit the way in which it exercises its taxing power over the income within its jurisdiction." *Id.* at 398-99. A similar principle should apply here as well. The fairness of an apportionment formula should give a state no greater license to tamper in a geographically selective manner with a taxpayer's preapportionment net income base than to adjust in a geographically discriminatory manner its post-apportionment tax liability.

The deductibility of WPT payments, though only one possible manifestation of the issue presented here, is itself substantial. Since the tax was imposed in 1980, crude oil producers have paid more than $78 billion in WPT to the federal government.[9] As the New Jersey Supreme Court acknowledged, Congress assumed, when it enacted the WPT, that those payments "would generally be deductible for state income tax purposes." App. 34. The enormous amounts involved, however, are an inviting target for state tax authorities. As the record in this case illustrates, disallowing a deduction for WPT payments can have a dramatic effect on producers' state tax liabilities.

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[9] *Budget of the United States Government, Fiscal Year 1988, Supplement*, Table 17, at 6c-34.

By denying a WPT deduction, New Jersey was able to increase the tax liability of these 11 appellants for taxable year 1980 alone (when crude oil price controls remained largely in effect and WPT payments were accordingly limited) by $8.3 million, an increment of 22 percent. App. 84a. In 1981, as WPT payments accelerated following the termination of price controls, the state tax repercussions were even more striking. For just the five appellants whose 1981 tax year is at issue, denial of the WPT deduction produced an aggregate increase in New Jersey tax liability of $12.5 million, an increment of 260 percent. *Id.* The impact on individual companies can be particularly egregious. In the case of Amerada Hess, for example, disallowance of the WPT deduction raised its New Jersey tax liability for 1981 from about $860,000 to $7.6 million, an increase of 775 percent. *Id.*

The full impact of the decision below, of course, is not limited to these appellants or to these two tax years. New Jersey itself recently estimated that, just for the years 1980 through 1984, the add-back provision, as construed below, would increase state tax receipts by $98 million.[10]

New Jersey is not alone. Six other states—either by express statutory provision or by ruling of state tax authorities—specifically disallow an income tax deduction for WPT payments.[11] Not surprisingly, all but one of those states, like New Jersey, have no crude oil production at all; the remaining state has only negligible production.[12]

[10] *New Jersey Budget Message and Taxpayers' Guide, Fiscal Year 1987-1988*, at 11 (Feb. 2, 1987).

[11] The states are Georgia, Iowa, Minnesota, New York, South Carolina, and Wisconsin. In addition, during the transition year of 1980, North Dakota imposed a ceiling of $1 million on a corporation's deduction of WPT payments. For years after 1980, the North Dakota statute permits a full deduction for WPT. The manner in which each of these states treats WPT payments is summarized at App. 85a-91a.

The overwhelming majority of states, moreover, use federal taxable income as the starting point for computing state corporate income tax, and many of those have add-back provisions similar to New Jersey's.[13] Whether such states are free to depart from the federal starting point, or from any other neutral starting point, in a geographically tailored manner has national implications well beyond the immediate scope of this litigation. If the New Jersey decision were upheld, for example, it could spawn attempts by tax authorities in the nonproducing states to withdraw deductions for state severance taxes imposed on oil, gas, and other mineral production, thereby increasing the nonproducing states' tax revenues at the sole expense of out-of-state business activities.

II. THE NEW JERSEY TAX, AS CONSTRUED AND APPLIED, IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUES

It is fundamental that, "[u]nder both the Due Process and the Commerce Clauses of the Constitution, a State

[12] Only in New York is any crude oil produced, and its rate of production—in 1986 as well as in 1980 and 1981—averages only about 2,300 barrels per day, or less than three one-hundredths of one percent of the nation's total crude oil production of approximately 8.6 million barrels per day. The data are drawn from official publications of the Energy Information Administration, U.S. Department of Energy: *Petroleum Supply Annual 1986*, Vol. I, Table 9, at 31 (May 1987); *Petroleum Supply Annual 1981*, Vol. I, Table 9, at 43 (July 1982); *Energy Data Reports: Crude Petroleum, Petroleum Products, and Natural Gas Liquids: 1980*, Table 5, at 12 (December 1981).

[13] Of the 46 jurisdictions (including the District of Columbia) that impose a tax measured by corporate net income, 38 incorporate the Internal Revenue Code as the starting point for computing state taxable income. 1 Multistate Corp. Income Tax Guide (CCH) ¶¶ 125, 251. Many states disallow a deduction for, or require the add-back of, federal and state taxes measured by income or profit. *See id.* ¶¶ 97, 318, 321.

may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. v. Franchise Tax Board*, 463 U.S. at 164, *quoting ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). In the case of a multistate company that derives its income from more than one jurisdiction, a state may tax only that portion of the company's income that is fairly attributable to its in-state business activities. *Butler Bros. v. McColgan*, 315 U.S. at 506.

One constitutionally permissible way to determine the locally taxable portion of a company's multistate income is the "unitary business/formula apportionment method." *Container*, 463 U.S. at 165. It involves two steps. First, the state must compute the company's tax base subject to apportionment. That requires (i) "defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part" (*id.*), and (ii) determining the total amount of the unitary business's preapportionment net income. Second, the state "must then apply a formula apportioning the income . . . within and without the State," using "factors that actually reflect a reasonable sense of how income is generated." *Id.* at 169.

The unitary business/formula apportionment method does not permit a state to tax "extraterritorial values." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 442 (1980); *Butler Bros. v. McColgan*, 315 U.S. at 507. On the contrary, the method is permissible only insofar as it produces a "'rough approximation' of the corporate income that is 'reasonably related to the activities conducted within the taxing State.'" *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 223 (1980), *quoting Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). In the words of Justice Holmes, "[t]he purpose is not . . . to open to taxation what is not within the State," but only to estimate "the true value of the things within it." *Wallace v. Hines*, 253 U.S. 66, 69 (1920).

The Court has synthesized these territorial limitations on state taxing power as part of a four-pronged test, developed principally in Commerce Clause cases but embodying Due Process standards as well. *See* 1 J. Hellerstein, *State Taxation* ¶ 4.8, at 123 (1983). To pass constitutional muster, a state tax, including one that employs the unitary business/formula apportionment method, (1) must be "applied to an activity with a substantial nexus with the taxing State," (2) must "be fairly apportioned," (3) must "not discriminate against interstate commerce," and (4) must be "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In applying the *Complete Auto* test, the Court is particularly vigilant to the dangers posed by geographically "tailored" state taxes that "single out interstate businesses and subject them to effects forbidden by the Commerce Clause." *Id.* at 288 n.15. Such tailoring "creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State." *Id.* Accordingly, "[a] tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Id.*

As applied to vertically integrated oil companies, the New Jersey tax is geographically tailored. It singles out for uniquely disadvantageous treatment a substantial cost incurred on account of a business activity—crude oil production—that is performed only in states other than New Jersey. In its practical operation, the tax produces precisely the "forbidden effect" of which *Complete Auto* warned, violating all four prongs of the test. Putting to one side for a moment the question of discrimination, we address in this section the three territoriality prongs of the *Complete Auto* standard: fair apportionment, nexus, and fair relationship.

A. New Jersey's Construction of its Add-Back Provision Geographically Distorts the Tax Base of Crude Oil Producers and Results in an Unfairly Apportioned State Tax

The fairness of apportionment depends not only on the state's apportionment formula but also on the makeup of the tax base to which the formula is applied. The composition of the base turns on two considerations—the scope of the unitary business and the state's definition of taxable income. If a state defines income in a manner that incorporates out-of-state values disproportionately, even the fairest apportionment formula will necessarily yield a geographically biased and therefore improper result.

It follows that if, as here, a state imposes a tax based on net income—thereby allowing deductions from gross receipts—it cannot, consistent with constitutional limitations, tailor the allowable deductions to benefit local activities or burden foreign activities either (1) by permitting deductions for costs incurred only inside the state, or (2) by disallowing deductions for costs incurred only outside the state. Relatively minor departures from that principle might well fall "within the substantial margin of error inherent in any method of attributing income among the components of a unitary business." *Container*, 463 U.S. at 184. But where, as here, a discrete group of substantial taxpayers incurs a large out-of-pocket business expense on account of activities conducted exclusively outside the taxing jurisdiction, and where disallowing a deduction for that expense significantly augments both the taxpayers' tax liability and the state's tax collections, the tailoring of the income base should not be tolerated any more than other attempts to tax a disproportionate share of multistate income.

It is no answer to say, as New Jersey argued below (App. Div. Br. 21-23, 117-18) and as the state Supreme Court apparently assumed (App. 33a-34a), that deductions are solely a matter of legislative grace. In the first place, an allowance for the cost of producing goods is intrinsic to the kind of "net income" that may properly

be apportioned by a three-factor formula like New Jersey's. But even if a state were free to disallow all deductions and to tax a proportionate share of a multistate company's gross receipts, it would not follow that the state could permit or deny deductions from gross receipts without regard to constitutional restrictions. Once a state determines to allow deductions, it must do so on a geographically neutral basis. Were it otherwise, the fair apportionment standard could be evaded by the simple expedient of carving out deductions that effectively favor in-state or disfavor out-of-state activities.

A state could not, without exceeding its territorial taxing jurisdiction, single out an exclusively out-of-state business activity and require a taxpayer to double the income from that activity in computing its taxable net income. That would be "a mere effort to reach profits earned elsewhere under the guise of legitimate taxation." *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271, 283 (1924). The state should have no greater latitude, under the heading of legislative grace, to deny a deduction for half of the costs incurred on account of an out-of-state activity. Halving out-of-state deductions, no less than doubling out-of-state income, distorts the preapportionment tax base, violates the fair apportionment requirement, and "project[s] the taxing power of the state plainly beyond its borders." *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 365 (1940).

This Court in *Westinghouse* rejected a similar attempt to invoke legislative grace. New York sought to justify its geographically discriminatory tax credit on the theory that it "forgives merely a portion of the tax that New York has jurisdiction to levy" (466 U.S. at 398)—in effect, because the state can tax the whole, it should be altogether free to tax a part. The Court held, however, that "it is not the provision of the credit that offends [constitutional limitations], but the fact that it is allowed on an impermissible basis, *i.e.*, the percentage of a

specific segment of the corporation's business that is conducted in New York." *Id.* at 406 n.12.

As in *Westinghouse*, the issue here is not whether New Jersey can grant or deny a deduction but whether it can do so "on an impermissible basis." *Id.* By disallowing a deduction for WPT costs incurred in connection with oil production activities performed exclusively outside the state, New Jersey defines its net income tax base in a geographically unbalanced fashion. The result, even after apportionment, is effectively to attribute to New Jersey a grossly disproportionate share of the multistate income of oil producers. The extraterritorial effect of New Jersey's add-back provision, moreover, like the discriminatory impact of New York's tax credit, tends to increase with the level of the disfavored out-of-state activity. 466 U.S. at 400-01 & n.9.

The unitary business approach permits New Jersey to tax a fair share of a taxpayer's "unitary stream of income," including income derived from the production of crude oil. *Exxon Corp. v. Department of Revenue*, 447 U.S. at 226. That income carries with it, however, a unitary stream of costs associated with the production of that income. A state cannot fairly tax the income while separating out and refusing to recognize costs associated only with out-of-state income-producing activities. That is simply another way of taxing more than a fair share of the unitary income.

B. The Effect of the Add-Back Provision Is to Impose on Crude Oil Production Activities with Which New Jersey Has No Nexus a Separate Tax Measured by Wellhead Values that Bear No Relationship to Activities Within New Jersey

The New Jersey add-back provision, as construed and applied, is indistinguishable in economic substance from a separately imposed New Jersey version of the federal WPT. The provision requires a producer to increase its preapportionment tax base by an amount equal to its

federal WPT liability, to "apportion" a share of that amount to New Jersey, and to pay tax on that share at the CBT rate of nine percent. The resulting increased tax liability is exactly the same as it would be if New Jersey simply imposed an "apportioned" WPT of its own at a rate equal to nine percent of the federal rate.[14]

The add-back provision, therefore, stands on the same constitutional footing as a state WPT. If New Jersey could not impose its own version of the federal WPT, neither may it accomplish the identical result in the form of an add-back to the CBT tax base.

Under the "nexus" and "fair relationship" prongs of the *Complete Auto* test, New Jersey is foreclosed from adopting a state WPT. The nexus and fair relationship criteria operate together to require a territorial link between a taxing state and both the operating incidence and the measure of the tax. The nexus standard is a "threshold requirement." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). It forbids a state from levying "*any* tax" (*id.*; emphasis in original) on business activities with which it lacks a "minimal connection." *Exxon Corp. v. Department of Revenue*, 447 U.S. at 219; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 436. The fair relationship standard, which is "closely connected" to the nexus requirement, "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the [state's]

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[14] Assume, for example, that a taxpayer's federal WPT liability for a particular year is $1 million and that its New Jersey apportionment fraction is 20 percent. Under the CBT as construed, the taxpayer must add $1 million to its preapportionment tax base, of which 20 percent (or $200,000) would be apportioned to New Jersey. The state would then apply its nine percent CBT rate to produce an increased tax liability of $18,000. Alternatively, if the state had simply adopted its own "apportioned" WPT at nine percent of the federal rate, the taxpayer's preapportionment New Jersey WPT liability would be equal to nine percent of the $1 million federal liability (or $90,000). New Jersey's apportioned share would be 20 percent of that amount (or $18,000). The effect is identical.

contact" with the taxpayer. *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original).

When a state properly taxes the corporate net income of a unitary business, its nexus with any part of the unitary business empowers it to tax a fair portion of the entire "unitary stream of income." *Exxon*, 447 U.S. at 226. By contrast, when a state taxes a corporation's transactions, as opposed to its net income, the state must have a nexus with the transactions themselves, not just with the corporation. The rule is that "a state which controls the property and activities within its boundaries of a foreign corporation admited to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere." *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 80-81 (1938).

Consistent with that principle, the Court held last Term that, when "the activity of wholesaling . . . [is] conducted wholly within [a particular state]," that state and "no other State has jurisdiction to tax" the gross proceeds derived from the activity. *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810, 2822 (1987). Similarly, because mineral production occurs at a specific location, one state and only one state can have a nexus sufficient to tax it directly. *Commonwealth Edison*, 453 U.S. at 617. "'[T]he severance can occur in no other state' and 'no other state can tax the severance.'" *Id.*

That rule bars New Jersey from imposing a state WPT on the "removal" of a barrel of crude oil from out-of-state "premises." "Removal" of a barrel of oil consists of lifting the oil from the ground and transporting it away from the well. That event is indistinguishable for constitutional purposes from the "severance" of coal or other minerals. Indeed, at the time of its enactment, Congress repeatedly characterized the WPT as an "excise, or severance, tax." H.R. Conf. Rep. No. 817, *supra*, at 92; *accord* S. Rep. No. 394, *supra*, at 2, 29, 154; H.R. Rep. No. 304, *supra*, at 2; *General Explanation* at

3, 26. Removal, like severance, can take place at only one location. As with severance, only the state within which the removal occurs has sufficient nexus with the activity to tax it.

The fair relationship requirement reinforces the nexus standard. It precludes New Jersey from imposing a tax whose measure is a percentage of the value of the crude oil produced in another state. Such a tax would not be "in 'proper proportion' to [the taxpayer's] activities within the State" but instead would be tied improperly to its activities outside the state. *Commonwealth Edison*, 453 U.S. at 626. In such a case, "when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Id.* at 629. That was the basis of the holding in *American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 2829 (1987), where the Court invalidated Pennsylvania's flat tax on truckers, in part because "the amount of . . . taxes owed by a trucker does not vary directly with miles traveled or with some other proxy for value obtained from the State." *Id.* at 2844.

As the New Jersey Supreme Court acknowledged, the measure of the WPT is the incremental value attributable to decontrol of each barrel of crude oil "at the point the oil was removed from the producing property." App. 6a. The increased value of crude oil at the point of its removal from the producing property bears a direct relationship to the producer's activities within the producing state. But it "bears no relationship to the [producer's] presence or activities" in New Jersey, *Commonwealth Edison*, 453 U.S. at 629, nor does it "vary directly with . . . [any] other proxy for value obtained from the State." *American Trucking Ass'ns*, 107 S. Ct. at 2844.

It is of no consequence that New Jersey's tax is "apportioned" by a three-factor formula. New Jersey is not free to impose any tax—whether apportioned or

not—whose operating incidence falls on property or transactions with which the state has no nexus, or whose measure is unrelated to the taxpayer's activities in the state. Where, as here, a state lacks jurisdiction to tax an activity, it cannot acquire such jurisdiction by applying an apportionment formula, the effect of which is simply to tax the activity at a reduced rate. As in *Westinghouse*, talk of apportionment in these circumstances "serves only to obscure the issue." 466 U.S. at 398.

Nor can New Jersey sidestep the nexus and fair relationship restrictions by accomplishing the prohibited results within the structure of an income tax. The "standard of permissibility of state taxation [is] based upon its actual effect rather than its legal terminology." *Complete Auto*, 430 U.S. at 281. The Court "decline[s] to attach any constitutional significance to . . . formal distinctions that lack economic substance." *Westinghouse*, 466 U.S. at 405. It may be proper for a state to include income from out-of-state oil production activities in the preapportionment tax base of a unitary business. *Exxon*, 447 U.S. at 225-27. But where, as here, a state manipulates its income tax by including the out-of-state income while excluding the associated out-of-state costs, thereby producing an effect that would be forbidden if achieved independently of the income tax, the result is no less forbidden merely because the state attaches an income tax label to it.

III. THE NEW JERSEY TAX, AS CONSTRUED AND APPLIED, UNLAWFULLY DISCRIMINATES AGAINST AN EXCLUSIVELY OUT-OF-STATE BUSINESS ACTIVITY

The Commerce Clause and the Equal Protection Clause serve complementary purposes: both effectively prohibit the imposition of unjustifiably discriminatory tax burdens on out-of-state business. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981). New Jersey's add-back provision violates both clauses. It imposes a discriminatorily higher effective tax burden on crude oil production activities—all of which are carried out in states other than New Jersey.

"[N]o State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 337 (1977). That prohibition applies not only to "transactional taxes," such as the securities transfer tax in *Boston Stock Exchange*, but also to "taxes on general income." *Westinghouse*, 466 U.S. at 404. The New Jersey CBT, like the New York franchise tax in *Westinghouse*, "is a tax on the income of a business from its aggregated business transactions." *Id.* "It cannot be that a State can circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate—as is the franchise tax—rather than on individual transactions." *Id.*

Nor does it matter whether the additional burden is imposed in the form of a higher tax rate on out-of-state activities, a tax credit for in-state activities, or, as in this case, a disallowance of deductions for costs incurred only in connection with out-of-state activities. "The discriminatory economic effect . . . [is] identical." *Id.*

It is likewise inconsequential whether the statute is facially discriminatory or facially neutral. "[T]he Commerce Clause has a deeper meaning that may be implicated even though state provisions . . . do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *American Trucking Ass'ns*, 107 S. Ct. at 2839. The relevant inquiry is whether "[a] tailored tax, *however accomplished*, . . . produces a forbidden effect on interstate commerce." *Complete Auto*, 430 U.S. at 289 n.15 (emphasis added).

The state itself conceded below that the "additional tax cost" borne by integrated oil companies under the

CBT "arises because [those companies] produce crude oil." App. Div. Br. at 121. The New Jersey Supreme Court similarly acknowledged that "[p]laintiffs are denied a deduction because they produce crude oil and pay the W.P.T." App. 34a. Those concessions are fatal under Commerce Clause jurisprudence. To impose a higher income tax burden on account of a taxpayer's out-of-state business activities is no different in principle from discriminatorily taxing those activities directly. *Westinghouse*, 466 U.S. at 404. Both results are forbidden.

The New Jersey Supreme Court mistakenly believed that the discriminatory tax burden is constitutionally inoffensive "because it does not favor in-state over out-of-state economic activity." App. 34a. It is true, of course, that the tax does not favor New Jersey crude oil production—there is none. In that respect, this case presents a slight twist on the questions considered in *Boston Stock Exchange* and *Westinghouse*. Those cases established that a state could not impose a heavier tax burden on out-of-state transactions than on the same transactions conducted within the state. The question here is whether a state may single out for special tax burdens a form of business activity that is conducted only in other jurisdictions.

Though the Court has never directly addressed that question, the "clear import of [its] Commerce Clause cases is that such discrimination is constitutionally impermissible." *Boston Stock Exchange*, 429 U.S. at 335. Allowing individual states to assess discriminatorily higher taxes on account of exclusively out-of-state business transactions would jeopardize "the free trade which the [Commerce] Clause protects." *Id.* at 329. If states with no mineral production, for example, could impose special tax burdens on mineral production activities, producing states would be equally free to impose retaliatory taxes designed to burden activities conducted only in non-producing states. The result—a web of discriminatory state tax levies—would discourage commerce among the states.

A company's opportunity to compete on even terms within a state, and therefore the likelihood that it will seek to do business there, is naturally reduced if it must bear unique tax burdens solely because of its business activities in another state. A tax like New Jersey's therefore "falls short of the substantially even-handed treatment demanded by the Commerce Clause." *Id.* at 332. Its "inevitable effect is to threaten the free movement of commerce by placing a financial barrier around" the taxing state. *American Trucking Ass'ns*, 107 S. Ct. at 2840.

Although there is no local oil production for New Jersey to favor, the CBT's discrimination does provide "a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). The integrated companies that produce oil outside New Jersey and market their products within New Jersey are denied a deduction for a substantial cost of their out-of-state production activities. By contrast, local independent marketers, with whom the integrated companies compete at the retail level in New Jersey, are permitted a full deduction for their cost of goods sold. As a consequence, an integrated company bears a higher effective tax cost than does a directly competing independent marketer.

The discriminatory effect can be shown by a simple illustration. Suppose that the cost of producing a barrel of domestic crude oil before WPT is 20, that the WPT cost is 10, that refining costs are 12, that the wholesale price of gasoline is 42, that marketing costs are 2, and that the price of gasoline at the pump is 46. To permit a comparison at the retail level, assume further that the integrated company earns no profit at the production or refining levels but earns the same profit as the independent marketer at the retail level. The following table shows that New Jersey's add-back provision operates to tax an integrated company more heavily than the independent marketer with which it competes:

Integrated Producer/Marketer	Independent Marketer
46 gross receipts	46 gross receipts
−42 cost of goods sold [15]	−42 cost of goods sold [15]
4 federal gross income	4 federal gross income
− 2 marketing expense deduction	− 2 marketing expense deduction
2 federal taxable income	2 federal taxable income
+10 N.J. WPT add-back	+ 0 N.J. WPT add-back (inapplicable)
12 N.J. tax base	2 N.J. tax base

Altering the assumptions to account for a profit at the production and refining stages does not negate the discriminatory effect of the add-back provision. The integrated company would still be subjected to a higher effective tax burden than its local independent competitor. Its taxable income, unlike the independent's, is inflated because of the state's refusal to recognize a substantial component of the integrated company's cost of goods sold.

That some members of the favored class of independent marketers may operate in interstate commerce does not insulate from Commerce Clause attack the discrimination against out-of-state crude oil production. The Commerce Clause prohibits the imposition of a discriminatory tax burden on out-of-state "business operations," *Boston Stock Exchange*, 429 U.S. at 337, even if the burden falls only on a segment of interstate operators. In *American Trucking Ass'ns*, for example, the Court struck down Pennsylvania's discriminatory axle tax even though "*some* out-of-state carriers . . . pay the axle tax

[15] A company's "cost of goods sold"—including the acquisition cost of finished products and costs "incident to and necessary for production or manufacturing operations or processes" (Treas. Reg. § 1.471-11(b)(1))—is subtracted from gross receipts to determine federal gross income. Treas. Reg. § 1.61-3(a). The integrated company's cost of goods sold in the illustration includes pre-WPT production costs of 20, WPT costs of 10, and refining costs of 12, for a total of 42. The independent marketer's cost of goods sold consists of the wholesale gasoline acquisition cost of 42.

at a *lower* per-mile rate than some Pennsylvania based carriers." 107 S. Ct. at 2842 (emphasis added). *Accord Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39-42 (1980) (invalidating a Florida statute that discriminated against some but not all out-of-state bank holding companies); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 348-54 (1977) (striking down a North Carolina statute that discriminated against some but not all out-of-state apple growers).

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), on which the New Jersey Supreme Court relied (App. 34a), is of no help to the state. The Court there upheld against Commerce Clause challenge a Maryland statute prohibiting crude oil producers and refiners from operating retail service stations within the state. As the Court emphasized, however, Maryland's prohibition, unlike New Jersey's add-back provision, neither "raised the cost of doing business for out-of-state dealers" nor gave "instate independent dealers . . . [a] competitive advantage over out-of-state dealers." *Id.* at 126. Moreover, the power to exclude a company from doing business within a state does not imply the power, asserted by New Jersey here, to admit the company on the condition that it submit to a discriminatory tax burden that would otherwise offend either the Commerce Clause, *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 47-48 (1910), *Pullman Co. v. Kansas*, 216 U.S. 56 (1910), or the Equal Protection Clause. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 875 (1985); *Western & Southern Life Insurance*, 451 U.S. at 667-68.

Finally, New Jersey cannot justify its discriminatory application of the add-back provision on the ground that "nonproducing marketers did not benefit, as did plaintiffs, from the decontrol of crude oil prices, but had to purchase their crude oil at the higher decontrolled prices." App. 34a. To the extent that an integrated company has benefited from decontrol, the benefit is reflected in its

overall net income, a fair portion of which is properly subject to taxation by New Jersey under the CBT *without* the add-back provision. WPT payments represent the *federal treasury's* share of higher crude oil prices. From the producer's standpoint, WPT liability is a burden, not a benefit. New Jersey's discriminatory attempt to tax both the increased net income *and* the WPT tax cost resulting from decontrol is not a rational way to equalize the tax treatment of producers and nonproducers. On the contrary, it unjustifiably puts producers at a material economic disadvantage.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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